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Nos. 80-965, 80-1018

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-965

TEXACO, INC., et al. - - - - - Appellants

versus

LOUISE F. SHORT - - - - - - Appellee
STATE OF INDIANA - - - - - Intervenor

No. 80-1018

EDEN H. POND, et al. - - - - - Appellants

versus

ULYSSES G. WALDEN, JR., et ux. - - Appellees
LOUISE F. SHORT - - - - - - Intervenor

Appeals from the Supreme Court of Indiana

JOINT REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

PAGE

A. Appellees Make Inaccurate Categorizations in the Opening Section of Their Brief 2

B. Appellees Fail to Distinguish Why a Dormant Mineral Act Is Not a Taking of Property 4

C. Appellees' Analogy to Remedial Acts Ignores the Significant Differences Between Those Acts and Dormant Mineral Legislation 8

D. Appellees' Categorization of the Indiana Mineral Lapse Act as Being Self-Executing Does Not Make It Constitutional 11

E. There Are Constitutional Mechanisms Available to State Legislatures to Achieve the Same Ends as the Indiana Mineral Lapse Act 15

F. The Classification Contained in the Indiana Mineral Lapse Act Violates tht Equal Protection Clause 17

G. Contrary to Appellees' Contentions, the Indiana Mineral Lapse Act Creates a Severe Impairment on a Contract 18

Conclusion 19

TABLE OF AUTHORITIES

Cases: PAGE

Allied Structural Steel v. *Spannaus* (1978), 438 U. S. 234, 98 S. Ct. 217, 57 L. Ed. 2d 727 ..... 18, 19

Berman v. *Parker* (1954), 348 U. S. 26, 75 S. Ct. 98, 99 L. Ed. 27 5

Board of Curators v. *Horowitz* (1978), 435 U. S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 7

Chase Securities Corporation v. *Donaldson* (1945), 325 U. S. 304, 65 S. Ct. 1137, 89 L. Ed. 1628 9

Contos v. *Herbst* (Minn. 1979), 278 N. W. 2d 732 .. 15

Gerhard v. *Stephens* (1968), 68 Cal. 2d 864, 442 P. 2d 692 10

Goldblatt v. *Town of Hempstead* (1962), 369 U. S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130 6

Hawkins v. *Barney's Lessee*, 30 U. S. (5 Peters) 457, 467 (1831) 9

Love v. *Lynchburg National Bank & Trust Co.* (1965), 205 Va. 860, 140 S. E. 2d 650 14

Mullane v. *Central Hanover Bank & Trust Co.* (1950), 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 13

Nelson v. *Bloodworth* (1977), 238 Ga. 264, 232 S. E. 2d 547 13

Northern Cheyenne Tribe v. *Hollowbreast* (1976), 425 U. S. 649, 96 S. Ct. 1793, 48 L. Ed. 2d 274 5

Ochoa v. *Hernandez y Morales* (1913), 230 U. S. 139, 33 S. Ct. 1033, 57 L. Ed. 1427 12

Pennsylvania Coal Co. v. *Mahon* (1922), 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 332 ..... 5, 6

Regional Rail Reorganization Act Cases (1974), 419 U. S. 102, 95 S. Ct. 335, 42 L. Ed. 2d 320 ... 5

Stanley v. *Illinois* (1972), 405 U. S. 645, 92 S. Ct. 1209, 31 L. Ed. 2d 551 17

Tremble v. *Gordon* (1977), 430 U. S. 762, 97 S. Ct. 1459, 62 L. Ed. 2d 31 17

Wilson v. *Bishop* (1980), 82 Ill. 2d 364, 412 N. E. 2d 522 16

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APPEALS FROM THE SUPREME COURT OF INDIANA

JOINT REPLY BRIEF OF APPELLANTS

Appellees in their Brief attempt to shift the focus of this appeal to an uncontested issue: whether the Indiana Mineral Lapse Act satisfies the minimal requirements of substantive due process—i.e., whether it is rationally related to a legitimate legislative objective. (Appee. Br. 10-14). The reasonableness of the asserted public purpose behind the Indiana Mineral Lapse Act (also referred to as the Indiana Dormant Mineral Act) has not been challenged by us in this appeal. However, what is at issue before the

Court in this appeal is whether the means used in this Legislation to accomplish this policy satisfy constitutional requirements, particularly the procedural requirements of the due process clause. The essential constitutional defect of the Indiana Mineral Lapse Act is that it takes a fee simple real property interest without providing for any antecedent notice or an opportunity to be heard. The Act is designed in such a way as to promote the forfeiture of a valuable real property interest—even taking severed mineral interests from owners who are still very much aware of their ownership, who are living in the area, and who are actively working to develop their interests. (See Statement of Facts in Appellants' Briefs). The Indiana Mineral Lapse Act fails to provide even minimal procedural due process protections of notice and an opportunity to protect the property interest or contest the legitimacy of the taking.

A. APPELLEES MAKE INACCURATE CATEGORIZATIONS IN THE OPENING SECTIONS OF THEIR BRIEF.

In the opening sections of their brief, the Appellees make certain misleading categorizations which must be clarified. First of all, they refer to the Appellants as the "mineral claimants" and the rights involved are referred to as "abandoned mineral claims." As set forth by the Supreme Court of Indiana in its decision in this case, *Short* v. *Texaco,* Juris. St. in *Pond* v. *Walden,* A-4, as a matter of Indiana property law, severed mineral interests are interests in real property, independent of the ownership of the surface, which may be transferred and conveyed in such a manner as all other interests in real estate. Therefore, the Indiana Mineral Lapse Act does not extinguish "mineral

claims," but causes a forfeiture and extinguishment of actual fee simple ownership in real property. Also, as the Statement of Facts in our opening briefs indicate, the owners of the mineral interests have not in fact, or at common law, abandoned their mineral interests. The owners of the mineral interests, Appellants herein, had even begun developing their interests prior to the initiation of the present causes of action.

Secondly, the Appellees assert in their Brief that the severed mineral interests which are being extinguished by the Act are so speculative in nature as to render them of little or no value. However, even when there is little or no information regarding the mineral reserves in the property, the speculative value of the mineral interest is often worth hundreds of dollars per acre. Additionally, when there is geological information indicating substantial reserves, the mineral rights will usually be far more valuable than the surface rights. Furthermore, the number of states which have passed dormant mineral legislation, and the number of lawsuits and appeals that have resulted from this legislation is indicative of the value of the property rights involved. Certainly, this present appeal would not have been brought to this Court if only "worthless" mineral rights were at issue. In any event, constitutional issues are not determined on the quantum of value of property. If the property has been unlawfully taken, it matters not whether it was worth $100.00 per acre or $10,000.00 per acre.

B. APPELLEES FAIL TO DISTINGUISH WHY A DORMANT MINERAL ACT IS NOT A TAKING OF PROPERTY.

Apparently conceding that the Indiana statute must fail as procedurally deficient if its mandated transfer of a mineral estate to the surface owner can accurately be classified as a "taking," Appellees attempt to argue that the Indiana Mineral Lapse Act does not effect a taking of property. Their first contention in this regard is that the Act "is clearly not a taking . . . because it is not a taking for public purposes." (Appee. Br. 15.)

Certainly by this assertion Appellees cannot mean that the Indiana statute is not a device to implement what Indiana regards as a significant public purpose, for on the preceding page of their brief they argue:

> The statute in this case is designed to facilitate the development of Indiana's natural resources—both surface and subsurface. (*Id.* 14).

Moreover, Appellees conclude their substantive due process argument with the contention that "the State is permitted to act in the public interest even though the effect may be to interfere with the liberty or property of individuals. . . ." *Id.* Clearly then, by Appellees' own admission, the Indiana statute, like every statute constituting a taking of property, is designed to serve a "public purpose."

The only other possible interpretation of Appellees' contention that the Indiana statute is not a "taking for public purpose" is that the statute does not require the transfer of property to the State. However, as was demonstrated in Appellants' opening briefs, a statute which directs a transfer of property to a private party or which limits the use of property for the benefit of another, is a taking, just

like a statute that results in the direct transfer of property to the State.[1] (*Pennsylvania Coal Co.* v. *Mahon* (1922), 260 U. S. 393 (beneficiaries of statute were private owners of surface interests); *Regional Rail Reorganization Act Cases* (1974), 419 U. S. 102, 148-55 (transfer of rail properties to "basically a private, not a governmental, enterprise," *id.* at 152—Conrail—could be a taking); *Northern Cheyenne Tribe* v. *Hollowbreast* (1976), 425 U. S. 649; *Berman* v. *Parker* (1954), 348 U. S. 26.

Appellees also argue that the inclusion of a grace period in the Indiana statute saves it from invalidity under the taking clause. They refer to the absence of such a grace period or similar device in the statute struck down by the Court in *Mahon* (Appee. Br. 16),[2] and argue that, since the mineral estate owner is permitted to take action to avoid the operation of the statute, it cannot constitute a taking.

There is no ongoing grace period now applicable under this statute. That phase ended in 1973; the original two-

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[1]The only decision cited by appellees to support their position on this aspect of their argument is *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 135 (1977). Appellees in *Penn Central* argued that the New York City Landmarks Law is "an instance . . . in which government, acting in an enterprise capacity, has appropriated part of their property for some strictly governmental purpose." *Id.* While this Court did not accept that proposition, it went on to articulate a much broader rationale for rejecting the taking argument. Thus, to the extent *Penn Central* is relevant to the public purpose point, it supports appellants' position, since the Court did not find it sufficient to rest its decision on its rejection of the "strictly governmental purpose" argument.

[2]Appellees' reference to a statutory grace period, while irrelevant to an analysis of the takings issue, foreshadows their analogy between the Dormant Mineral Act and statutes of limitation (*see* Appee. Br. 17-19). The shortcomings of any such analogy are discussed at pages 8-9, *infra*, and are covered at length in Appnt. Br., *Pond* v. *Walden*, 34-36.

year period following passage of the Act is over. No grace period now exists. In any event, the original two-year period was of no real consequence except as to owners whose mineral interests had been created at least eighteen years earlier. It cannot be a material consideration now. Surely it cannot be argued that such a one-time opportunity—even assuming that the time period is reasonable—can salvage the constitutionality of an otherwise unconstitutional burden.

As the starting point for their third and final argument against the existence of a taking, Appellees note that in *Penn Central, supra,* the Court stated that "a state statute . . . may so frustrate distinct investment-backed expectations as to amount to a taking." (Appee. Br. 15.) Appellees then suggest that the mineral interests at issue in this case represent only slender "investor-backed expectations," which do not rise to the level of the interests at stake in *Mahon, supra,* and *Goldblatt* v. *Town of Hempstead* (1962), 369 U. S. 590, where deposits of coal and gravel were actually being mined at the time of the taking. (Appee. Br. 16.)

This argument is not only based upon the previously discussed mistaken notion of the significance of the real estate interests at issue in this case but, more importantly, it proceeds from a misreading of the entire field of eminent domain law. The factor identified by the *Penn Central* Court as one of three that may indicate that a taking has occurred does not focus upon the value of "investor-backed expectations," but relates instead to

> [t]he economic impact of the regulation on the claimant and, particularly, *the extent to which the regulation has interfered with* distinct investor-backed expectations. . . ." 438 U. S. at 124 (emphasis added.)

The Indiana statute, of course, interferes totally with such expectations. The size of these "investor-backed expectations," whether huge or relatively insignificant, was of no concern to the *Penn Central* Court.

The law could hardly be otherwise. No court of which we are aware has ever suggested that the protection of the due process clause of the Fourteenth Amendment or of the taking clause of the Fifth Amendment is a function of the price paid for the property taken by the Government or its fair market value at the time of the taking. While these factors, of course, are properly considered in determining the amount of the compensation owed a person whose property has been taken, they never have been considered in determining whether those rights constitute "property" within the meaning of the Fifth and Fourteenth Amendments. Indeed, for the Court to follow the lead suggested by Appellees here and define property interests on this basis would contradict both the Indiana Supreme Court's recognition of mineral interests as valuable property rights deserving of constitutional protection[8] and this Court's holding in *Board of Curators* v. *Horowitz* (1978), 435 U. S. 78, where it recognized that States, not federal courts interpreting the Constitution, have the authority to define the existence of property rights, *Id.* at 82.

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[8]The Indiana Court stated:

"Interests or estates in oil, gas, coal and other minerals lying beneath the surface of the land are interests in real estate for our purposes here, and as such are entitled beyond question to the firmest protection of the Constitution from irrational state action. They are vested property interests separate and distinct from the surface ownership." Juris. St. in *Pond* v. *Walden*, A-4.

C. APPELLEES' ANALOGY TO REMEDIAL ACTS IGNORES THE SIGNIFICANT DIFFERENCES BETWEEN THOSE ACTS AND DORMANT MINERAL LEGISLATION.

Analogizing the Mineral Lapse Act to general statutes of limitation, different forms of marketable title legislation, and the doctrine of abandonment, Appellees next argue that the Indiana statute is so similar to these that it must be constitutionally correct.[4] (Appee. Br. 16-24.) As we have shown in our opening briefs (Appnt. Br. in *Pond* v. *Walden*, 34-38), this argument ignores significant differences between the Indiana statute and the legislation and judicial doctrines relied upon by Appellees.

Appellees place primary emphasis upon decisions of this Court upholding statutes of limitation against constitutional challenges. Statutes of limitation, however, occupy a special, almost unique position in our legal system and do not lay the foundation for generalized and broadly applicable principles of due process and takings law.

As this Court has stated in upholding a statute of limitations:

> The right to appropriate a derelict is one of universal law, well known to the civil law, the common law, and

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[4]Appellees' description of 43 U.S.C. § 1744 as a "Dormant Mineral Act pertaining to Federal lands" is inaccurate. (See Appee. Br. 24, n. 7.) Dormant mineral acts like the Indiana statute here under review deprive mineral estate owners of property interests previously created by deed or other instrument. By contrast, the federal statute referred to by Appellees imposes a requirement upon those who assert claims to minerals underlying public lands to register their claims so as to acquire in the first instance an interest in those minerals. The statute does not impose any recording or other requirements to preserve an interest previously created by a deed or other instrument. It is, therefore, wholly dissimilar to the statute now before this Court.

> all law; it existed in a state of nature; and is only modified by society, according to the discretion of each community." *Hawkins* v. *Barney's Lessee,* 30 U. S. (5 Peters) 457, 467 (1831).

This "universal law" is based on society's preference for a state of repose in which the potential claims that can be asserted against its members through the judicial process are certain and known. *Chase Securities Corporation* v. *Donaldson* (1945), 325 U. S. 304. Moreover, statutes of limitation are designed to protect the integrity of the judicial system by placing upon parties the obligation to move in a timely fashion to enforce their claims while witnesses' memories are fresh and documents bearing upon the existence of the claim are still reasonably available. *Id.* at 314. Statutes of Limitation assume unresolved disputes and set maximum time limits for the disputes to be brought to court. Here there are no such disputes except those which the Act in question itself creates.

When seen in this light, statutes of limitation provide no justification for dormant mineral acts. To the contrary, by placing in issue actions of the mineral estate holder over the prior 20-year period, such statutes create controversies that of necessity are difficult to prove because of uncertain memories and missing documents. Dormant mineral acts, far from protecting the integrity of the judicial process, instead create disputes that will be brought to court for adjudication on a stale record.

Appellees also erroneously point to the existence of state marketable title acts to support their arguments. These statutes, however, are designed principally to reduce the transactional costs of property transfers by shortening the period through which the record of title must be searched, and to clear up collateral matters relating to title. They serve a far different purpose than the Mineral

Lapse Act, which seeks to extinguish severed mineral interests by reason of their non-development.

In any event, Appellees' reliance on marketable title acts cannot resolve the procedural due process issues in this case, since this Court has never passed upon the constitutionality of such statutes. That the state courts' acceptance of marketable title acts does not establish the constitutionality of the far different Mineral Lapse Act is illustrated by the fact that the highest courts of three states — Illinois, Minnesota, and Nebraska — which have upheld marketable title acts (*see* Appee. Br. 21-22, 27 N. 9) have subsequently struck down dormant mineral acts.

Finally, state law regarding abandonment of property, which lies at the heart of Louisiana's doctrine of liberative prescription and the California decision of *Gerhard* v. *Stephens* (1968), 68 Cal. 2d 864, 442 P. 2d 692 (*see* Appee. Br. 22-23), does not validate the Indiana Mineral Lapse Act. It should first be pointed out that, contrary to the contentions of Appellees, Indiana is not similar to Louisiana in its classification of mineral interests, in that Indiana classifies many types of mineral interests as corporeal rather than incorporeal. (Appnt. Br. in *Pond* v. *Walden*, p. 14). Statutes and judicial decisions establishing the law of abandonment turn upon an interference, reasonably derived from the unexplained non-use of the property by its owner, that he or she has made it available to another. A conflict develops between two parties claiming ownership of the property, which can only be resolved by judicial decree. Dormant mineral legislation, by retroactive criteria, takes property in which there was no previous conflict as to ownership. As shown by the present cases, the surface owners would have no claim to ownership of the mineral rights but for the Indiana Mineral Lapse Act. In any event, abandonment is a state law rule

and neither Indiana nor any other state has upheld dormant mineral legislation on an abandonment theory. It is clear that—as pointed out by Appellees in their Brief (Appee. Br., 5)—as a matter of Indiana law, a mineral estate cannot be lost by abandonment, and this statute cannot be saved by an abandonment theory.

D. APPELLEES' CATEGORIZATION OF THE INDIANA MINERAL LAPSE ACT AS BEING SELF-EXECUTING DOES NOT MAKE IT CONSTITUTIONAL.

In contending that the retroactivity of the Indiana Mineral Lapse Act does not violate the Due Process Clause, Appellees refer to the self-executing nature of the statute (Appee. Br. 28-33) and contend that to require notice and a hearing in this case before permitting the extinguishment of the mineral interest owners' rights would be "contrary to several centuries of Anglo-American legal tradition." (*Id.* at 29.)

Appellees principally rely, as did the Indiana Supreme Court, upon four decisions of this Court that dealt only with statutes of limitation.[5] Of course, by their very nature statutes of limitation must be self-executing. The type of prior notice which we urge as a constitutional prerequisite for dormant mineral acts would be unthinkable in a statute of limitation context—*e.g.*, a potential defendant's notice to a plaintiff that a claim, which the plaintiff might not even know he possesses, must be asserted within the statutory period or be forever lost. The litigation-inducing

[5] *Hawkins* v. *Barney's Lessee* (1831), 30 U. S. (5 Peters) 457; *Terry* v. *Anderson* (1877), 95 U. S. 628; *Turner* v. *New York* (1897), 168 U. S. 90 (evidentiary presumption construed by state court to create statutory period of limitation); *Wilson* v. *Iseminger* (1902), 185 U. S. 55.

consequences of such a rule explain its absence from the law.

In standing upon "centuries" of "legal tradition" in other unidentified areas of law, Appellees probably have in mind the self-executing statute that deals with the regulation of conduct. It is, of course, a truism that "ignorance of the law is no defense," so that if a person intends the natural and ordinary consequences of his actions he or she can be held civilly or criminally liable even if it cannot be demonstrated that defendant had prior notice of the law's requirements. However, before a specific statute can be applied to a specific person, that person must be given notice and an opportunity for a hearing. Following the criminal law analogy, while it is true that "ignorance of the law is no defense," it is still necessary to notify the accused of the particulars of the crime committed and have a trial in compliance with due process requirements, regarding the guilt of the accused.

Moreover, there have been "centuries" of law developed under the Constitution mandating notice and an opportunity to be heard prior to the application of a statute which, like a dormant mineral act, purports to take property and give it to another. *See Ochoa* v. *Hernandez y Morales* (1913), 230 U. S. 139, 161. Appellees have cited no self-executing statute operating like a dormant mineral act that has ever been upheld.

Even more glaringly, Appellees have failed to explain the Court's holdings in the escheat cases[6] discussed in the opening brief. (*See* Appnt. Br. in *Pond* v. *Walden*, 24-25). These cases establish that notice and an opportunity to appear, be heard, and declare an interest in dormant prop-

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[6]*Standard Oil Co.* v. *New Jersey* (1951), 341 U. S. 428; *Anderson National Bank* v. *Luckett* (1944), 321 U. S. 233; *Security Savings Bank* v. *State of California* (1923), 263 U. S. 282.

erty must precede the transfer to the State of title to bank accounts, accounts receivable and other personal property.

In their attempt to discredit these cases, Appellees assert that the escheat cases should not apply because it is easier to provide notice to bank account holders than owners of mineral estates. (Appee. Br., 48.)[7] *Mullane* v. *Central Hanover Bank & Trust Co.* (1950), 339 U. S. 306, of course, provides the simple answer to this contention: notice of the transfer of title need not be personal but may be by publication where owners are unidentifiable or unlocatable.

As we have noted in our initial briefs, the highest courts of six states have recently reviewed the constitutionality of dormant mineral legislation, and in four instances have struck down such statutes. (Appnt. Br. in *Pond* v. *Walden*, 9-11.) Appellees claim to find support for the decision below in the decisions of three other state supreme courts. (Appee. Br. 34-37.) Two of the three decisions relied upon by Appellees, however, provide no support for their position.

In *Nelson* v. *Bloodworth* (1977), 238 Ga. 264, 232 S. E. 2d 547, the Georgia Supreme Court reviewed a mineral statute that purported to allow a surface owner to acquire title to mineral interests by adverse possession after seven

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[7]This argument is repeated elsewhere where appellees state that a hearing procedure will raise intractable factual issues and will make it difficult or impossible for Indiana to achieve its goal of encouraging mineral development. Appee. Br. 7, 33. In fact, the opposite is true. The notice and hearing procedure urged here would permit the entry of a judgment that would finally and conclusively determine the factual issues raised by a dormant mineral act. Future development of mineral interests, therefore, will be made less complex by satisfying the requirements of due process, not more so.

years of non-use and non-payment of taxes. The holding of the Court, absent citations, follows in its entirety:

> As we read the 1975 act, although it became effective July 1, 1975, suit based on the act cannot be commenced until at least seven years from that date. . . . Plaintiff's action being at least premature, the trial court did not err in denying the relief sought. 232 S. E. 2d at 549.

The Virginia decision cited by Appellees, *Love* v. *Lynchburg National Bank & Trust Co.* (1965), 205 Va. 860, 140 S. E. 2d 650, is also irrelevant. The dormant mineral legislation in that case provided for the transfer of dormant mineral interests to the surface owner only after an action has been commenced (as to which notice is given to the mineral interest owner). In addition, the mineral estate owner must be afforded a period of not less than six months from the commencement of the suit, during which time he or she has the opportunity of demonstrating that valuable minerals are in fact located on the property. Only after no minerals are shown to exist does the Virginia statute permit judgment transferring title to the mineral interests to the surface owner. As the court held, the statute "was not intended to destroy or impair any ownership in existing property," 140 S. E. 2d at 653, since "if there are no minerals, there can be no mineral rights" *id.* The Indiana statute clearly lacks both the procedural and substantive safeguards provided in the Virginia act to ensure that no property is taken or property rights impaired.

E. THERE ARE CONSTITUTIONAL MECHANISMS AVAILABLE TO STATE LEGISLATURES TO ACHIEVE THE SAME ENDS AS THE INDIANA MINERAL LAPSE ACT.

Appellees argue in their brief that it would be impractical to provide due process notice and hearing prior to the extinguishment of the mineral interest. Granted, it may not be as expedient to provide notice and a hearing prior to the extinguishment of the severed mineral interest. However, as noted by Judge Walter H. Palmer, the trial judge in the present cases who declared the Indiana Mineral Lapse Act unconstitutional, "Expediency is not always justice whether the end sought is laudable or not." (J.A., *Pond* v. *Walden*, p. 35). The burden of providing notice and a hearing prior to the extinguishment of the mineral interest is slight in comparison to the value of that real property interest affected and the harm caused to the owner of that property interest.

Additionally, other jurisdictions have shown that it is possible to design dormant mineral legislation, or other types of legislation calculated to achieve the same ends, which provides notice and a hearing in conformity with procedural due process requirements. The Minnesota Dormant Mineral Act—which was declared unconstitutional by the Minnesota Supreme Court in *Contos* v. *Herbst* (Minn. 1979), 278 N. W. 2d 732—provided that the owner of a severed mineral interest must file a verified statement of ownership with the register of deeds and pay a yearly tax in order to avoid forfeiture to the state. The Minnesota Act also had an escheat provision providing that the owner of the severed mineral interest would be compensated for the taking. However, the Minnesota Act was held constitutionally defective because there was no requirement in

the Act requiring notice and a hearing to the owner of the interest prior to the forfeiture. The Act was subsequently amended by the Minnesota legislature in 1979, Minn. Stat. Ann. § 93.55(1), to require notice and a hearing prior to the forfeiture, and this presumably would satisfy the requirements of procedural due process as outlined by the Minnesota Supreme Court in the *Contos* decision and argued by us in this appeal.

As noted in our initial Brief, the Illinois Supreme Court in the case of *Wilson* v. *Bishop* (1980), 82 Ill. 2d 364, 412 N. E. 2d 522, held the Illinois Dormant Mineral Act to be unconstitutional. Recently, the Illinois legislature passed Senate Bill No. 591, which bill is presently awaiting the signature of the Governor of Illinois to become law. This legislation provides a mechanism for leasing oil and gas interests of owners who cannot be located. The Illinois Act sets forth that if one makes a good faith effort to locate the owner of an oil and gas interest, and he or she cannot be found, a Complaint may be filed with the county court in which the oil and gas interest is located requesting the right to lease the oil and gas interest. After notice by publication to the missing owner, the court appoints a trustee to act as agent for the missing owner. The trustee then negotiates an oil and gas lease on behalf of the missing owner, with the royalties obtained pursuant to the lease being held in escrow on behalf of the missing owner.

The Minnesota and Illinois statutes clearly indicate that there are other mechanisms available for achieving the same ends as the Indiana Mineral Lapse Act, but which comply with procedural due process requirements.

F. THE CLASSIFICATION CONTAINED IN THE INDIANA MINERAL LAPSE ACT VIOLATES THE EQUAL PROTECTION CLAUSE.

The Appellees argue in their brief that the exception to the filing requirements contained in Indiana Code 32-5-11-5 —requiring that notice be given to certain owners of multiple severed mineral interests—does not affect a sensitive and fundamental right which would require strict scrutiny. However, the Indiana Mineral Lapse Act creates a classification which mandates that procedural due process notice be given to a special interest group while denying similar due process notice protection to all others. When a state statutory classification approaches such sensitive and fundamental rights—such as procedural due process notice—strict scrutiny is the standard used to examine such legislation. *Tremble* v. *Gordon* (1977), 430 U. S. 762.

The Appellees oversimplify the distinction between the present case and *Stanley* v. *Illinois* (1972), 405 U. S. 645, by labeling *Stanley* a parental rights case and the present appeal a mineral interest case. This Court stated in *Stanley* on 405 U. S. 649:

> We conclude that, as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending to all other parents whose custody of their children is challenged, the state denied Stanley the equal protection of the laws granted by the 14th Amendment.

As in *Stanley*, the Indiana Mineral Lapse Act grants due process protection to one class while denying such due process protection to others who are in similar need of protection.

Appellees argue in their brief (Appee. Br. 39-44), that the classification is merely an economic one and therefore must only avoid being arbitrary and capricious to satisfy the equal protection clause. But even under this low scrutiny test, the Indiana Mineral Lapse Act must fail. The Indiana Mineral Lapse Act creates a classification which protects a special interest group which has less need of protection than the much larger group which is not offered such protection. The owners of multiple severed mineral interests in a county are far more likely to be aware of legislation affecting their interests than small mineral interest owners who typically do not have the personnel, time, or financial ability to keep abreast of such legislation. The Indiana Mineral Lapse Act is arbitrary and capricious in that it provides protection to the very class of persons who least need protecting Thus, even applying a low level scrutiny test of the equal protection clause, the Indiana Mineral Lapse Act must fail.

G. CONTRARY TO APPELLEES' CONTENTIONS, THE INDIANA MINERAL LAPSE ACT CREATES A SEVERE IMPAIRMENT ON A CONTRACT.

The Appellees argue in their brief that the modern contract clause test as set forth by this Court in *Allied Structural Steel* v. *Spannaus* (1978), 438 U. S. 234, does not apply to the present cases because the Indiana Mineral Lapse Act does not create a severe impairment on a contract. The Appellees argue that the two year grace period for recording a statement of claim with the County Recorder imposes only a slight impairment on the contract. However, the Appellees again ignore the severity of the consequences of failure to file the statement of claim—that being the complete destruction of the contractual rights

created by the severance instrument. It is this impairment which sets the height of the hurdle which the state legislation must clear. *Spannaus, supra,* 438 U. S. at 244-245. Appellees apparently concede in their brief that if the *Spannaus* test applies, and this Court finds a severe impairment of contract, the Indiana Mineral Lapse Act could not be justified by examining the necessity or the nature and purpose of such legislation. Given then the severity of the impairment, the Indiana Mineral Lapse Act fails to provide the protection required by the Contract clause of the U. S. Constitution.

CONCLUSION

Having addressed and refuted each of the arguments advanced by Appellees in support of the decision below, we reiterate the position which we have taken in our principal briefs: Our attack here is upon the procedural aspects of dormant mineral legislation that operates, like the Indiana statute, without any notice or opportunity for hearing prior to the divesting of a clearly recognized property right.

We do not make a substantive due process challenge to the statute nor assert in this Court any quarrel with the policies which Indiana seeks to serve. We do contend that those policies must be carried out in a manner that comports with the basic concepts of fairness embodied in the due process of law requirement of the Fourteenth Amendment, as it stands on its footing and as it incorporates the taking clause of the Fifth Amendment. At a minimum, this requires that the best possible notice under the circumstances be given to a mineral estate holder prior to an administrative or judicial proceeding which would accord finality in transferring his or her property to a surface owner.

Appellees resort to the argument that it would be "impracticable" to extend constitutional rights of notice and hearing to this case is indefensible. At a time when this Court has required notice of informal administrative action to apprise an individual of the interruption of his utility service,[8] the revocation of a driver's license,[9] the termination of social security payments,[10] and the like, it cannot be plausibly contended that it is impracticable to give constitutional notice prior to the destruction of title to a valuable real property estate.

For the reasons set forth in this brief and the initial briefs of Appellants, it is respectfully requested that the Indiana Mineral Lapse Act be declared unconstitutional and null and void insofar as it pertains to the Appellants, and that the decision of the Indiana Supreme Court be reversed.

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[8] *Memphis Light, Gas, and Water Div.* v. *Craft* (1978), 436 U. S. 1.

[9] *Bell* v. *Burson* (1971), 402 U. S. 535.

[10] *Goldberg* v. *Kelly* (1970), 397 U. S. 254.